IN THE
MISSOURI SUPREME COURT

STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	
vs.	)	No. SC 85958
	)	
JERRY L. KEIGHTLEY,	)	
	)	
Appellant.	)	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF WEBSTER COUNTY, MISSOURI
THIRTIETH JUDICIAL CIRCUIT, DIVISION 1
THE HONORABLE JOHN W. SIMS, JUDGE

APPELLANT'S SUBSTITUTE STATEMENT, BRIEF AND ARGUMENT

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JURISDICTIONAL STATEMENT

Appellant, Jerry L. Keightley, appeals from his convictions, after a jury trial in Webster County, Missouri, of one count of statutory rape in the second degree, Section 566.034 RSMo 1994[1], and two counts of statutory sodomy in the second degree, Section 566.064. The Honorable John W. Sims sentenced Appellant, as a prior and persistent offender, to three consecutive twelve year terms of imprisonment. This Court granted transfer pursuant to Missouri Supreme Court Rule 83.04 and therefore jurisdiction lies in this Court. Article V, Section 10, Mo. Const. (as amended 1976).

[1] All statutory references are to RSMo 1994 unless otherwise noted.

STATEMENT OF FACTS

Prior to trial, Appellant filed a Motion to Dismiss, arguing that the State had improperly filed a *nolle prosequi* after receiving an adverse ruling from Judge Anderson in Hickory County that excluded its DNA evidence (2Supp. L.F. 1)[2] The State then filed a new Information and a change of venue was granted, moving the case to Webster County (L.F. 1). Appellant's motion to dismiss was denied (Tr. 15).

After the case was moved to Webster County, the State refiled its Motion for Pretrial Ruling on the General Acceptance and Admissibility of PCR-STR DNA Testing Technology and Brief in Support Thereof (L.F. 12). Appellant filed a Motion to Determine Admissibility of Novel Scientific Evidence and Request for a *Frye*[3] Hearing (Supp.L.F. 83). The State's motion was granted without an evidentiary hearing (L.F. 40).

The original Information charged that Appellant had committed one count of statutory rape and two counts of statutory sodomy against Dawn Zepeda between April 6, 1999, through and until August, 1999 (L.F. 8-9). During the instruction conference, the State was permitted to amend the Information to

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[2] The record on appeal consists of a four volume transcript (Tr.), a Legal File (L.F.) a Supplemental Legal File (Supp.L.F.), and a Second Supplement Legal File (2Supp.L.F.)

[3] *Frye v. United States*, 54 App.D.C. 46, 293 F. 1013 (1923)

expand the time of the offenses to between February, 1999 and August 1999 (Tr. 623).

Sarah Bass met Appellant in Florida in 1996 (Tr. 267), and they lived together for about a year before moving to Wheatland, Missouri (Tr. 267). Appellant, Sarah, and Sarah's children, Terry, Donald, Dawn, and Dustin moved into a three bedroom trailer owned by Appellant's father (Tr. 268). They lived there until August, 1999 (Tr. 282).

Appellant gave Sarah a diamond ring two days after Easter, 1999[4]. He told her she could consider it an engagement or promise ring and the couple talked of marriage (Tr. 270).

Sarah and Appellant began having sexual difficulties and had not had intercourse for eight or nine months prior to the move to North Carolina (Tr. 272). Sarah became suspicious when Appellant would turn away from her sexual advances (Tr. 272). He would sometimes go out at night without telling her where he was going (Tr. 272).

While Appellant and Sarah were not having sexual intercourse, he insisted on oral sex three or four times a week (Tr. 320). Appellant told Sarah that he could not ejaculate during intercourse and he would force her to continue with oral sex until he ejaculated (Tr. 311). Dawn knew about the sexual problems between Appellant and Sarah because Sarah talked to her about them (Tr. 313).

Because she was suspicious, Sarah asked Dawn, who was then sixteen years old, whether Appellant had ever touched her and Dawn denied it (Tr. 273). In 1999 Dawn was in special education classes in middle school (Tr. 276-277). Although not retarded, Dawn was "slow," and did not graduate from high school (Tr. 277).

Sarah asked Dawn four or five times if Appellant was "messing" with her and each time Dawn denied it (Tr. 297). She first asked Dawn in June (Tr. 298) and Dawn assured her that she would tell if anyone, including Appellant, ever touched her (Tr. 299). She left Dawn alone with Appellant because she "would do anything he'd ask [her] to do." (Tr. 298). In giving a final estimate as to how many times Dawn and Appellant were left home alone, Sarah said six or eight (Tr. 321). She estimated that he had taken Dawn to a friend's house four or five times (Tr. 322).

Appellant would often tell Sarah to drive into town to buy him cigarettes or other items and to take the boys with her, but to leave Dawn home with him (Tr. 273). These requests occurred after April 6, 1999 (Tr. 274). Appellant would have her go to town almost every day or every other day (Tr. 306), at least three or four times a week (Tr. 307). There were a couple of times when Dustin stayed home, and when Sarah returned, she found Dustin in his room with the door shut (Tr. 309). Appellant would tell her that Dustin was being punished, or was just taking a nap (Tr. 318).

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[4] Easter was on April 4, 1999.

Appellant would volunteer to take Dawn to the home of her friend, Trisha Davis (Tr. 278). He drove her there twice (Tr. 278). Davis lived about ten miles from the trailer, but it would take Appellant an hour to an hour and a half to take Dawn to Davis' (Tr. 279). Dawn became "clingy" and got to a place where she did not want to be out of Sarah's sight (Tr. 280). She would relax when Appellant was out of the trailer, but when he was there, she would lock herself in her bedroom (Tr. 280). Sarah testified that she had a policy that none of her children were to be in a room with the door closed (Tr. 319). It was at this time that Sarah began questioning Dawn about inappropriate touching by Appellant (Tr. 280). Dawn always said that nothing had happened (Tr. 281).

Sarah drove a Honda Accord in June, 1999, until it was wrecked (Tr. 275). After that, she depended on Appellant's mother to drive her on errands and she stayed home the rest of the time (Tr. 275). Sarah could not drive Appellant's truck because it had a standard transmission and she did not know how to drive with a stick shift (Tr. 275).

In August, Appellant began talking about moving to North Carolina (Tr. 282). One day Appellant announced they were moving and told Sarah to start packing (Tr. 282). They packed up two pickup trucks and Appellant and his father drove the family to North Carolina (Tr. 282). Sarah assumed Appellant was moving too until they pulled into her mother's driveway and he announced that he was going on to Florida (Tr. 284). He asked Sarah to go with him but she said

"no." (Tr. 284).

Sarah helped separate Appellant's clothes from all the rest and then he left (Tr. 284). He called two or three times a day for the next two days, crying and asking Sarah to come back to him (Tr. 285). By this time however, Sarah believed that Appellant had been sexually molesting Dawn and she told him it was over between them (Tr. 285). When Sarah told Appellant what she believed, he denied it and asked how she could think such a thing (Tr. 286).

Sarah thought that she and Appellant would marry (Tr. 291). When they left Missouri for North Carolina, she did not know they were breaking up (Tr. 293). Sarah was upset because she loved Appellant and he had talked like he was intending to come back for them (Tr. 295). She was hurt to have been "dumped" in North Carolina (Tr. 295). The fact that Appellant did not give her any food or money hurt too (Tr. 296).

A day or two after they arrived in North Carolina, Dawn went to Georgia to visit her Aunt Deana (Tr. 375). Dawn told Deana that Appellant had been sexually abusing her (Tr. 376). Deana called Sarah, and the women took Dawn to the hospital the next day (Tr. 287).

When Dawn was taken to the hospital, the police seized her underwear (Tr. 351). She had been wearing the same pair since before they left Missouri (Tr. 300), and from Dawn's description, the underwear could have had semen on it (Tr. 396).

When Sarah told Appellant she knew what he had done, his calls became threatening (Tr. 286). He told her he knew how to use a compound bow and that he could shoot her and no one would be able to tell from which direction the arrow came (Tr. 287). He said that if he went to jail, whoever put him there would never see the next day. (Tr. 287).

Dawn remembered Appellant giving her mother a ring "somewhere after Easter and Valentine's Day." (Tr. 378). When she was alone with Appellant, he touched her (Tr. 380). This happened in his bedroom, in front of the truck and in the bed of his truck (Tr. 380). It happened more than once (Tr. 380). It would happen when Appellant would send her mother out for cigarettes (Tr. 381). Her mother and the boys would take Appellant's truck, with Terry driving (Tr. 381). Terry had moved out of the trailer in April (Tr. 271). This started happening a month or two before Appellant gave Sarah the ring (Tr. 382).[5]

Appellant would tell her to go to his bedroom (Tr. 383). He would tell her to shut and lock the door (Tr. 383), and take her clothes off (Tr. 384). He would take his clothes off and tell her to lie on the bed where he would lay on top of her and insert his penis into her vagina (Tr. 386). When she tried to get away, he pulled her back and told her if she did not lie still, he would "shove it in really hard" (Tr. 386). He ejaculated "a few times." (Tr. 386). This would happen "like

[5] Sarah had testified that these trips to the store began after she received the ring from Appellant (Tr. 274).

every other day." (Tr. 387). On several occasions, he inserted his penis into her anus (Tr. 388). This happened before her mother got the ring, but only once afterward (Tr. 388). Appellant "tried" to make her suck his penis (Tr. 389). He put it in her mouth "for a few minutes just once" (Tr. 389). This happened in the truck when he took her to her friend's house (Tr. 389). In previous testimony, Dawn had testified that Appellant had asked her once or twice to perform oral sex but she refused to do it (Tr. 401). When she was asked if she had ever put her mouth on Appellant's penis, she answered "no." (Tr. 402). She was telling the truth when she said that (Tr. 403). However, she had also previously testified that Appellant put his penis in her mouth and that was the truth (Tr. 421). Appellant performed anal sex with her "just once" in the truck, but she refused to perform oral sex in the truck (Tr. 392). Appellant told her to go ahead and tell, that no one would believe her (Tr. 393).

The last time Appellant had sex with Dawn was just before they left for North Carolina (Tr. 394). On that occasion, Appellant ejaculated and Dawn had to clean it off with a towel (Tr. 395). When she put her panties on, they felt wet (Tr. 396). She did not change her underwear until they were taken from her in the hospital (Tr. 396).

Cary Maloney, criminalist supervisor with the Missouri Highway Patrol (MSHP) Crime Laboratory did the DNA testing on Dawn's underwear (Tr.438, 461). The first time he ran the test, he realized that it had been contaminated

because he found his own DNA in the results (Tr. 491). This was the first time in seventeen years of testing that this had happened (Tr. 522). The second time he ran the test, he obtained results which he did not believe were good enough to allow him to make any conclusions (Tr. 524). The third time he ran the test, no DNA showed (Tr. 525). The fourth time he ran the test, he obtained "a profile that [he] felt [he] could draw correct conclusions on." (Tr. 490). That conclusion was that the underwear showed a mixture of Appellant's and Dawn's DNA and that Appellant could not be excluded as a potential contributor to that mixture (Tr. 485).

Maloney testified that he could only separate the male from the female DNA to a "certain degree," but not to the degree necessary to determine who the major and who the minor contributors were. (Tr. 516).

In his testing, Maloney used the STR method, which the MSHP lab had begun using in 1999 (Tr. 509). He ran these tests in August, 1999 (Tr. 518). Maloney also testified that he had trouble when he tested Appellant's known sample because a spike showed up in the results. He reset the machine to eliminate that spike (Tr. 528). Maloney's population frequency estimate for Appellant having the same DNA as someone else was 1 in 141,600, 000,000,000,000 for the Caucasian data base and 1 in 3,051,000,000,000,000,000 using the Black data base (Tr. 498). According to Maloney, the statistics for both the Caucasian and Black data bases were developed using 200 random samples of

DNA (Tr. 501). Maloney admitted that it was possible for two people sitting in the courtroom to have the same DNA (Tr. 547).

The State rested (Tr. 550), and Appellant's Motion for Judgment of Acquittal was overruled (Tr. 550). Appellant presented evidence from four witnesses.

Dean Stetler is an Associate Professor of Molecular Bio-sciences at the University of Kansas (Tr. 551). The kits used by Maloney first came on the market in 1998 and "not all the components have been fully defined and subject to peer review and independent testing. The sequences used in the primers have never been published" (Tr. 559). Validation studies have been done by employees of the manufacturer (Tr. 562). According to Stetler, the advantages of the STR method are superior discrimination power and results which can be obtained much quicker than with other DNA testing methods (Tr. 565-566). The disadvantage is the test's sensitivity which makes it very easy to contaminate the sample (Tr. 566).

When Appellant sought to ask Stetler about the transferability of semen, the State's objection that he was not qualified was sustained (Tr. 573). Stetler stated that cross contamination with Appellant's DNA was a concern in this case (Tr. 590). His concern stemmed from the fact that in the first run, there was plenty of DNA but it was contaminated with Maloney's DNA, in the second run there was not enough DNA to allow conclusions to be made, in the third run there was no DNA (Tr. 600). Stetler indicated that that does not make any sense and indicates

there was a problem with the testing (Tr. 600). He indicated that at that point Maloney should have known that his testing was not valid and begun again (Tr. 600). Stetler asked if you run four tests and get four results, which is valid? Maloney simply stopped after the fourth run and that was incorrect. He should have been able to repeat the process and get the same result in order to insure that the fourth run was valid (Tr. 601).

Loren Keightley, Appellant's father, testified that Appellant and Sarah moved into his trailer in February, 1998 (Tr. 632). While they were in Missouri, Sarah drove six different cars but she did not have a car for six weeks to two months before they left for North Carolina (Tr. 635). Appellant would drive her to work and to do errands (Tr. 635). Loren drove her to the store on at least three occasions during that period (Tr. 635).

Tracey Goodman worked with Sarah at Roll's Diner in Galmey in 1999 (Tr. 638). She worked with her once a week and never recalls Sarah driving herself to work; Appellant would always drop her off (Tr. 639). They worked together for more than a month (Tr. 639).

Trisha Davis was the friend Dawn would visit (Tr. 642). According to Davis, Dawn came to her home four or five times and Davis went to Dawn's home once or twice (Tr. 643). When Dawn would come to visit with Davis, she would ride the school bus (Tr. 644), and then someone would pick her up, usually her mother (Tr. 644). Davis knew Appellant and did not think that he ever picked Dawn up from her home although he did drive Davis home once (Tr. 644).

Davis said that she could not say under oath that Appellant never brought Dawn to her home (Tr. 646).

The jury returned verdicts finding Appellant guilty on all three counts (Tr. 691, L.F. 74-76). Appellant Motion for New Trial was overruled (Tr. 704), and Appellant was sentenced, as a prior and persistent offender (Tr. 49), to three, consecutive twelve year sentences (Tr. 718, L.F. 84). Appellant was granted leave to appeal *in forma pauperis* (L.F. 88), Notice of Appeal was timely filed (L.F. 87), and this appeal follows.

POINTS RELIED ON

I.

The trial court erred in overruling Appellant's motion to dismiss which alleged that the State acted in bad faith in entering a *nolle prosequi* after the trial court ruled that the State's DNA evidence was inadmissible under *Frye* and then refiling the same charges in order to get another judge, because that ruling was fundamentally unfair, violating Appellant's right to due process as guaranteed by the Fourteenth Amendment to the United States Constitution and Article 1, Section 10 of the Missouri Constitution in that it permitted the prosecution to forum shop without limitation for a favorable ruling on an important evidentiary issue in the case when Appellant had no corresponding right to do so.

United States v. Salinas, 693 F.2d 348 (5th Cir. 1982);

State v. Lomax, 712 S.W.2d 698 (Mo.App., E.D. 1986);

State ex rel. Cohen et al. v. Riley, 994 S.W.2d 546 (Mo. banc 1999);

State v. Davis, 159 G. App., 537, 284 S.E.2d 51 (1981);

U.S. Const. Amend. 14;

Mo. Const. Article I, Section 10;

Ind. Code Section 35-34-1-13(a) (1993);

Rules 17.21 and 51.05;

Fed. R. Crim. P. 48(a); and

24 ALR4th 877 section 2(a) (1984).

II.

The trial court erred in denying Appellant's motion for judgment of acquittal on Count II, statutory sodomy committed by Appellant placing his penis in the mouth of Dawn Zepeda, in accepting the jury's guilty verdict on that count and in sentencing Appellant on that count because there was insufficient evidence to prove his guilt beyond a reasonable doubt as required by the due process clause of the Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Missouri Constitution, in that Dawn Zepeda's testimony on that issue was so contradictory that it could not be relied on and without corroboration, leaves the mind clouded with doubt concerning Appellant's guilt of that offense.

State v. Kuzma, 751 S.W.2d 54 (Mo.App., W.D. 1987);

State v. Bursley, 548 S.W.2d 586 (Mo.App., W.D 1976);

State v. Pierce, 906 S.W.2d 729 (Mo.App., W.D. 1995);

Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979);

U. S. Const. Amend. XIV;

Mo. Const. Article I, Section 10; and

Section 566.064.

III.

The trial court abused its discretion in granting the State's Motion for Pretrial Ruling on the General Acceptance and Admissibility of PCR-STR DNA Testing Technology and Brief in Support Thereof and denying Appellant's Motion to Determine Admissibility of Novel Scientific Evidence and Request for a *Frye* Hearing and in admitting the State's DNA evidence without first holding an evidentiary hearing pursuant to *Frye* because those rulings denied Appellant's right to due process and a fair trial as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, Sections 10 and 18(a) of the Missouri Constitution in that the Appellant was denied the opportunity to prove that the new DNA technology, STR is not generally accepted in the scientific community because the primer sequence of the test kits used, Profiler Plus and COfiler, have not been released to the scientific community for peer review and verification of the validity of the method to produce reliable results.

Frye v. United States, 54 App. D.C. 46, 293 F. 1013 (1923);

State v. Davis, 814 S.W.2d 593 (Mo. banc 1991);

State v. Salmon, 89 S.W.3d 540 (Mo.App., W.D. 2002);

State v. Faulkner, 103 S.W.3d 346 (Mo.App., S.D. 2003);

U.S. Const. Amends. VI and XIV; and

Mo. Const. Article I, Sections 10 and 18(a).

ARGUMENT

I.

The trial court erred in overruling Appellant's motion to dismiss which alleged that the State acted in bad faith in entering a *nolle prosequi* after the trial court ruled that the State's DNA evidence was inadmissible under *Frye*[6] and then refiling the same charges in order to get another judge, because that ruling was fundamentally unfair, violating Appellant's right to due process as guaranteed by the Fourteenth Amendment to the United States Constitution and Article 1, Section 10 of the Missouri Constitution in that it permitted the prosecution to forum shop without limitation for a favorable ruling on an important evidentiary issue in the case when Appellant had no corresponding right to do so.

It is time for Missouri to join the majority of other state jurisdictions, and the federal courts, in placing some limitation on the State's unfettered discretion to enter a *nolle prosequi* in a case and then to refile the exact same charges when the State is motivated by bad faith and the Appellant is prejudiced.

***Preservation**:*

Prior to trial, Appellant filed Defendant's Motion to Dismiss or in the Alternative Defendant's Motion in Limine (2Supp.L.F. 1). The State filed its

[6] *Frye v. United States*, 54 APP. D.C. 46, 293 F. 1013 (1923).

response (Supp.L.F. 1-82), and the motion was overruled (Tr. 15). Appellant included this issue in his Motion for New Trial (L.F. 80) and therefore it is properly preserved for review by this Court.

Facts:

The State initiated the prosecution of Appellant on June 28, 2000 (Supp.L.F. 90). It did not file for a change of venue from Hickory County, nor did it request a change of judge (Supp. L.F. 90-92). The Appellant did file for a change of judge (Supp. L.F. 90). The Supreme Court appointed Senior Judge Anderson to hear the case (Supp. L.F. 90). The State did not contest this appointment (Supp. L.F. 90). Appellant then filed his Motion To Determine Admissibility of Novel Scientific Evidence and Request for a *Frye* Hearing (Supp. L.F. 91) and a *Frye* hearing was held (Supp. L.F. 92). At the end of the hearing, and based on all of the evidence presented by both the Appellant and the State, Judge Anderson ruled that the STR method of DNA testing was not generally accepted within the scientific community and granted Appellant's motion finding the evidence inadmissible (Supp. L.F. 92).

On April 11, 2001, the State asked the trial court to reconsider its ruling (Supp. L.F. 92). In the middle of that hearing, the State asked for a recess, left the courtroom, returned and entered a *nolle prosequi* (Supp. L.F. 92).

On June 29, 2001, the State refiled the same charges (L.F. 1). A change of venue was granted, but the record does not indicate which party requested that

change. The case was moved to Webster County and assigned to the presiding circuit court judge (L.F. 2).

The State filed its Motion for a Pretrial Ruling on the General Acceptance and Admissibility of PCR-STR DNA Testing Technology and Brief in Support Thereof (L.F. 12-39). The trial court granted the motion, finding that an evidentiary hearing was unnecessary (L.F. 40). The State had gotten its way and defeated a ruling that had been entered after a full and fair opportunity for it to litigate its position. There is no provision in Missouri law which would grant a criminal defendant the same opportunity to change the result of an evidentiary ruling it considered important to its case.

Argument:

A *nolle prosequi* is a prosecutor's formal entry on the record indicating that he or she will no longer prosecute a pending criminal charge. It results in a dismissal without prejudice unless jeopardy attaches to bar subsequent prosecution. *Jones v. State*, 771 S.W.2d 349, 351 (Mo.App., E.D. 1989). The prosecutor has unfettered discretion to enter a *nolle prosequi*, and the circuit court may not interfere with the exercise of that discretion. *State v. Flock*, 969 S.W.2d 389 (Mo.App., W.D. 1998) (citations omitted). When a prosecutor enters a *nolle prosequi* in a criminal case, the circuit court has no jurisdiction to proceed with the case. *Id.*, citing *State v. Smith*, 907 S.W.2d 301, 302 (Mo.App.,W.D. 1995). One limitation on the prosecutor's unfettered discretion is the circuit court's power to deny leave to enter a *nolle prosequi* after a guilty verdict and before sentencing.

State ex. rel. Norwood v. Drumm, 691 S.W.2d 238 (Mo. banc 1985). A more general limitation on a prosecutor's unfettered discretion was announced by this Court in *State ex. rel McKittrick v. Wymore*, 345 Mo. 169, 132 S.W.2d 979, 986 (1939), when it held that "[i]t is the duty of the prosecuting attorney, . . .though endowed with discretion in the performance of his duties to exercise his discretionary powers in good faith." (citations omitted).

A prosecuting attorney's unfettered discretion is based in common law, and the State asserts that in the absence of any statute or rule abrogating that discretion, it is the law in Missouri. *State v. Berry* 298 S.W.2d 429, 431-21 (Mo. 1957); *State ex rel Griffin v. Smith*, 258 S.W.2d 590, 593 (Mo. banc 1953)[7], *overruled on other grounds, State v. Honeycutt*, 96 S.W.3d 85, 88-89 (Mo. banc 2003)[8] But this Court has the authority to modify the common law by opinion.

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[7] In *Griffin*, this Court noted that a prosecuting attorney's arbitrary exercise of his discretion was not before the Court and would not be addressed. 258 S.W.2d at 595.

[8] *Honeycutt* held that a trial judge has jurisdiction to dismiss a case **without** prejudice. *Id*. at 88-89. *Honeycutt* reaffirmed that the prosecuting attorney has broad discretion to determine when, if and how criminal laws are to be enforced and that this discretion is **seldom** subject to judicial review. *Id*. at 89 (emphasis added).

Cox v. J.C. Penney Co., Inc., 741 S.W.2d 28, 30 (Mo. banc 1987), *citing*, *Gustafson v. Benda*, 661 S.W.2d 11 (Mo. banc 1983).

In *State v. Lomax*, 712 S.W.2d 698 (Mo.App., E.D. 1986), the State entered a *nolle prosequi* after the jury had been selected, but before it had been sworn. *Id*. at 699. The majority held that the prosecutor entered the *nolle prosequi* before the jury was sworn and therefore the charge could be refiled as long as double jeopardy had not attached. *Id*. It stated that the defendant's argument concerning prosecutorial overreaching was academic. *Id*.

In his concurring opinion, Judge Pudlowski noted that in most jurisdictions, there are checks on the prosecutor's unfettered discretion to enter a *nolle prosequi*. *Id*. at 701. Judge Pudlowski recognized the fundamental unfairness of this situation, noting that the Appellant does not share the State's power to unilaterally terminate a prosecution and start over when it is not going his way. *Id*.

Since *Lomax,* the State's unfettered discretion to enter *a nolle prosequi* has continued unabated, even when it is clear that the decision to terminate a prosecution is made in bad faith and in order to defeat an evidentiary ruling the State dislikes. *See e.g. State v. Maggard*, 906 S.W.2d 845, 847-48 (Mo.App., S.D. 1995) (State filed *nolle prosequi* rather than appeal after the trial court sustained a motion to suppress); *State v. Beezley*, 752 S.W.2d 915, 916-18 (Mo.App., S.D. 1988) (same); and *State v. Pippenger*,741 S.W.2d 710, 710-712 (Mo.App., W.D. 1987) (same).

When the State acts in bad faith and by its action prejudices the Appellant, it goes beyond unfairness and reaches the level of a due process violation. S*ee*, e.g., *United States v. Marion*, 404 U.S. 307, 324-25, 92 S.Ct. 455, 465, 30 L.Ed.2d 468 (1971); *State v. Beck,* 745 S.W.2d 205, 208-209 (Mo.App., E.D. 1987). (Defendant was deprived of a fair trial by reason of the prosecutor's purposeful injection of irrelevant and prejudicial evidence."). Appellant presents such a case.

CIVIL CASES:

Missouri law provides civil litigants with more protection against bad faith tactics by its opponents than it does criminal defendants. In *Jenkins v. Andrews*, 526 S.W.2d 369 (Mo.App. KCD 1975), the defendants filed a motion for summary judgment or, in the alternative, to dismiss plaintiffs' petition. *Id*. at 371. After an evidentiary hearing, the trial court indicated its intention to overrule the motion for summary judgment but to sustain the motion to dismiss unless an amended petition was filed. *Id*. Plaintiff asked for leave to amend which was granted. Instead of amending its petition, Plaintiff filed a motion for change of judge. *Id*. at 371. That motion was timely under the rules of civil procedure. *Id.* The trial court took up the Plaintiff's motion, but only after overruling the motion for summary judgment and sustaining the motion to dismiss. *Id*. Plaintiff appealed, claiming that because its motion for change of judge was timely, the trial court erred in not disqualifying himself prior to making any other rulings. *Id*. The Court disagreed, holding that "[i]t has long been settled in this state that the right to disqualify a judge is not to be employed 'to produce inconvenience and

absurdity.'" *Id.* at 372. The Court went on to say that the statute concerning change of judge was never intended to interrupt the progress of a suit and once the issues had been made up and tried, it is too late for complainant to come in and say that the judge is prejudiced. *Id.* "We will not presume that such a proceeding was designed to be tolerated…" *Id*. "It would be a hazardous doctrine to say that, after a judge had partially heard a case, a party thereto could stop that hearing by procuring a change of judge upon the ground of prejudice of the judge then actually trying the case." *Id*., quoting *State ex rel. Reeder, et al., v. Foard*, 268 Mo. 300, 188 S.W. 71 (en banc 1916).

This Court noted that the motion for summary judgment had already been taken up and evidentiary material had been submitted. *Id*. at 373. "To permit appellants to disqualify the judge, rather than to file their amended petition, would nullify the hearing which had been held, result in a duplication of the proceeding already undertaken, and permit appellants to take advantage of a tentative expression of opinion by the trial judge on the matter submitted to avoid his action upon it." *Id*.

State ex rel. Cohen et al. v. Riley, 994 S.W.2d 546 (Mo. banc 1999), presents facts similar to *Jenkins*. In *Riley*, the trial court granted the Plaintiff's request for a temporary restraining order after hearing evidence from both parties. *Id*. at 547. The following week, Respondent filed for an automatic change of judge pursuant to Rule 51.05. The issue addressed by this Court was whether, by presenting evidence to the trial court, Respondent had waived its right to file for a

change of judge. *Id*. at 548. In answering that question in the negative, this Court pointed out that the trial court had not consolidated the preliminary hearing matter with the trial on the merits. *Id*. at 549. Had it done so, Respondent would not have been allowed to seek a change of judge. *Id.*

The dissent in *Riley* argued that the Court's ruling was not only a departure from previous Missouri law and the established law in almost all other jurisdictions, "but it also will allow no end of wasteful procedural nonsense that will inevitably follow from this newly established rule of 'peek and run.'" *Id*. at 552. (Price. J. dissenting). In discussing the law in other jurisdictions, the dissent quoted from the American Law Reports that "…a party should not be permitted to participate in an action or proceeding to the extent that he is able to ascertain the attitude of the judge toward important aspects of his case and then avoid an adverse ruling by belatedly raising the issue of disqualification." *Id. quoting*, 24 ALR4th 877 section 2(a) (1984).

However, in *Riley* the majority held that although the Respondent could get its change of judge, the original trial judge's order granting the preliminary injunction remained in force, and therefore Respondent did not benefit by being able to defeat an unfavorable ruling. *Riley*, 994 S.W.2d at 549.

In Missouri, it seems that the Courts are more interested in protecting the rights of civil litigants in maintaining a case once it is in progress than in protecting a criminal defendant's right to be tried by the trial judge or jury that were initially selected and approved by both parties.

Just as the ruling in *Riley* was contrary to the law in most other jurisdictions, so too is Missouri's attitude toward the unfettered discretion of prosecuting attorneys to enter a *nolle prosequi*, even if it is done in bad faith and to avoid an adverse evidentiary ruling.

FEDERAL CASES:

In federal courts, dismissals of indictments are governed by Rule 48 of the federal Rules of Criminal Procedure which provides that "the United States Attorney may by leave of court file a dismissal of an indictment, information or complaint and the prosecution shall thereupon terminate. Such a dismissal may not be filed during the trial without the consent of the defendant." Fed.R.Crim.P. 48(a). "The primary purpose of the requirement is to prevent harassment of a defendant by charging, dismissing and re-charging without placing a defendant in jeopardy." *United States v. Salinas*, 693 F.2d 348, 351 (5th Cir. 1982).

In *United States v. Smith*, 55 F.3d 157 (4th Cir. 1995), the Court was called upon to interpret "by leave of court." Under Rule 48(a), the court has "little discretion" and "must grant the motion absent a finding of bad faith or disservice to the public interest." *Id*. at 159, citing *United States v. Perate*, 719 F.2d 706, 710 (4th Cir. 1983). The disposition of a government's motion to dismiss an indictment should be decided by determining whether the prosecutor acted in good faith at the time he moved for dismissal. *Id*. A motion that is not motivated by bad faith is not clearly contrary to manifest public interest. *Id*., citing *Rinaldi, v*. *United States*, 434 U.S. 22, 30, 98 S.Ct. 81, 86 54 L.Ed.2d 207 (1977).

Leave of court is properly withheld when there is evidence of bad faith by the prosecutor. Bad faith is evidenced when the government is motivated "by considerations clearly contrary to the public interest." *Salinas*, 693 F.2d at 351.[9] Examples of bad faith were found in *United States v. Hayden*, 860 F.2d 1483 (9th Cir. 1988) where the prosecutor moved for dismissal to avoid the trial court's previous denial of the State's motion for continuance. In *United States v Derr*, 726 F.2d 617 (9th Cir. 1984) bad faith was found when the prosecutor moved for dismissal because he was unprepared for trial. In *United States v. Salinas*, *supra*, the court found bad faith when the prosecutor moved to dismiss after selecting a jury he perceived would be hostile to his case.

Had Appellant's case been filed in federal court, the prosecutor would not have been permitted to enter a *nolle prosecui* in order to avoid Judge Anderson's adverse ruling on the admissibility of DNA evidence. Such a motive evidences bad faith, and this Court should so hold. The public interest was not served by having the court, the attorneys, the Appellant and the victim litigate a criminal case for ten months only to have all of that time, effort and expense wasted

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[9] This standard was recognized by this Court in *State ex. rel Norwood v. Drumm*, *supra*, when, in deciding the prosecuting attorney did not have discretion to dismiss a case after the verdict, it noted, "the court as well as the prosecutor is under a duty to consider the public interest in the fair administration of criminal justice." 691 S.W.2d at 241 (citations omitted).

because the State disagreed with an evidentiary ruling. In those ten months, the parties filed and litigated motions, deposed witnesses, issued subpoenas, and jurors were notified to appear for trial (Supp.L.F. 90-93). Much of that had to be repeated when the State refiled the same charges.

Not only should this Court consider the time, effort, and expense wasted by allowing the prosecutor to dismiss a case at any time prior to the verdict, but the perception of unfairness should also be considered. In *Beck, supra*, the Court was not only concerned that a single defendant had been denied his due process right to a fair trial, but "over and beyond" that concern was the Court's belief that it could not "ignore our responsibility for maintaining the integrity of our judicial system as the guarantee of a fair trial to all accused person." 745 WS.W.2d at 209.

The delay caused by the State's action was also against the public's interest in seeing that criminal charges are litigated in a timely manner so that the guilty may be punished and the innocent set free. This Court has attempted to deal with the delay in criminal cases by adopting Supreme Court Operating rule 17.21. In that rule, the Court directed that 98% of felony cases should be disposed of within one year. The Court specifically excluded 2% of the cases to account for "litigation with complex substantive and procedural issues or litigation involving extraordinary circumstances." Rule 17.21. There was nothing extraordinary about Appellant's case until the State entered its *nolle prosequi*. By doing so, it defeated this Court's efforts to resolve criminal cases in a timely manner. The prosecutor's

decision to enter a *nolle prosequi* in order to escape an adverse evidentiary ruling did not serve the public interest in the speedy disposition of criminal charges.

OTHER STATE JURISDICTIONS

If Appellant's case had been initiated in almost any other State, he would have been protected from the prosecutor's abuse of his discretion to *nolle prosequi* the charges to escape Judge Anderson's adverse evidentiary ruling. As examples, in the following states, consent of the trial court is required before the prosecutor may enter a *nolle prosequi* and refile charges: *State v. McNeill*, 716 So.2d 250 (Ala. Crim. App. 1998); *Wilcox v. State*, 236 Ga.App. 235, 511 S.E.2d 597, (1999); *People v. Sierb*, 456 Mich. 519, 581 N.W.2d 219 (1998); *State v. Pero*, 590 N.W.2d 319 (Minn. 1999); *People v. Williams*, 315 Ill.App.3d 22, 732 N.E.2d 767, 247 Ill.Dec. 712, (Ill App. 1 Dist. 2000); *Baker v. State*, 130 Md.App. 281, 745 A.2d 1142 (2000); *State v. Courtemarche*, 142 N.H. 772, 711 A.2d 248 (1998); *State v. Bolton*, 122 N.M. 831, 932 P.2d 1075, 1078 (1996); *Sheriff, Washoe County v. Marcus*, 995 P.2d 1016 (Nev. 2000); *Commonwealth v. Stivala*, 435 Pa. Super. 176, 645 A.2d 257, 261, (1994); *State v. Krueger*, 224 Wis.2d 59, 588 N.W.2d 921 (1999); *State v. Ward*, 303 N.J.Super 47, 696 A.2d 48 (N.J. Super. A.D. 1997); *State v. Needs*, 333 S.C. 134, 508 S.E.2d 857 (1998); *Hughes v. State*, 16 S.W.3d 429 (Tex.App. Waco 2000); and *State v. Barnes*, 133 Wash.App. 1036, 932 P.2d 389 (1997).

The State's do differ in the amount of deference they are willing to grant the prosecutor. For example, in *People v. Williams*, *supra*, the Illinois court noted

that "[t]he state has nearly unfettered discretion in determining whether to *nol-pros* a charge." 247 Ill.Dec. at 719, 732 N.E.2d at 774. The court went on to state that the consent and approval of the court are necessary before the state may enter a *nolle prosequi* but the standard of the discretion vested in the court to review the State's request is governed by a determination of whether the State's action is "capriciously or vexatiously repetitious" or whether it would cause substantial prejudice to the defendant. *Id*.

On the other end of the scale are Georgia and New Mexico. "It is the duty of the district attorney to determine whether it is in the public interest to recommend to the court that a case be *nol-prossed* (citation omitted). When a recommendation is made that an indictment be *nol-prossed,* it is within the discretion of the trial court whether to follow the recommendation." *State v. Davis*, 159 G. App., 537, 538, 284 S.E.2d 51, 52 (1981). *See also*, *Wilcox v. State*, supra, 236 Ga. App. at 238, 511 S.E.2d at 600. In *State v. Bolton, supra,* the Court stated that "trial courts may and should interfere with prosecutorial discretion when prosecutors have bad reasons for their actions." 932 P.2d at 1078. And in *State v. Ericksen,* 94 N.M. 128, 607 P.2d 666 (N.M. App. 1980), the Court upheld a trial court's dismissal with prejudice of a case the district attorney had *nolle prossed* in an attempt to get a change of judge. 607 P.2d. at 668. The trial court told the district attorney he had two choices, he could continue with the original case, or the judge would dismiss the charges with prejudice. *Id*. The district attorney argued that the trial court was without jurisdiction once the *nolle prosequi*

had been entered. *Id.* In upholding the trial court's dismissal, the appellate court stated that:

> We look past the form of the district attorney's usual right to file a *nolle prosequi* in any given case upon good cause and honest motives, and focus instead upon the substance of such conduct when he not only fails to demonstrate good faith, but leaves no other impression than that he had deliberately engaged in game-playing with the rules, and has misused his discretionary powers to achieve a barred result.

Id. at 669.

Indiana and Massachusetts seem to be the only other States which grant unfettered discretion to the prosecutor to enter a *nolle prosequi*. However, Indiana has provisions to protect the substantial rights of defendants where the State, after dismissing, seeks to refile. Under the authority of Ind.Code Section 35.34-1-13, the prosecuting attorney may move for dismissal of the information at any time prior to sentencing. Ind.Code Section 35-34-1-13(a) (1993). So long as the motion states a reason for the dismissal, the trial court must grant it. *Davenport v. State*, 689 N.E.2d 1226, 1229 (Ind. 1997). The dismissal of an information is not necessarily a bar to refiling, but there are some restrictions to the State's right to do so. *Id*. The State may not refile for the same offense if jeopardy has attached or if the dismissal and refiling were done for the purpose of defeating the

defendant's speedy trial rights. *Id*. (citations omitted). Nor may the State refile charges if to do so would prejudice the substantial rights of the defendant. *Id*. Beyond speedy trial and jeopardy rights, the Indiana courts have not defined what a "substantial right" is. *Id*. The Indiana courts have held that substantial rights do not include situations where the State has dismissed and refiled to avoid an adverse evidentiary ruling, *Id*., citing *Joyner v. State*, 678 N.E.2d 386 (Ind. 1997), or because the prosecuting attorney is not ready to try the case. *Id*. citing, *Johnson v. State*, 252 Ind. 79, 246 N.E.2d 181, 184 (1969).

In *Davenport*, *supra*, the Court reversed the defendant's convictions for felony murder, attempted robbery, and auto theft, finding that the prosecutor's dismissal and refiling were done in order to add those three charges to the information after the trial court had refused to permit the filing, "[b]y doing so, the State not only crossed over the boundary of fair play but also prejudiced the substantial rights of the defendant. Because of a sleight of hand, the State was able to escape the ruling of the original court and pursue the case on the charges the State had sought to add belatedly." *Id*. at 1230.

Indiana trial courts may curb the abuse of a prosecutor's discretion by refusing to permit the refiling of the same charges if to do so would prejudice the substantial rights of a defendant. This is a protection not found in Missouri, and the result is the continued abuse of the *nolle prosequi*, as shown by the State's conduct in this case.

DUE PROCESS

In *State v. Goodman*, 696 So.2d 940 (Fl.4th DCA. 1997), the defendant, an African-American, was on trial for battery of a law enforcement officer. *Id*. After voir dire, the State attempted to use one of its peremptory challenges on an African-American, but was precluded from doing so when the trial court disallowed the challenge after a hearing. *Id.* After the jury was selected, but before it was sworn, the State entered a *nolle prosecui*, refiling charges thirty minutes later. *Id*. The Defendant moved to dismiss the new charges, claiming that the State had acted solely to avoid the jury as selected and that his due process rights had therefore been violated. *Id*. The trial court granted the motion and the State appealed. In dismissing, the trial court had specifically said "I draw from the conclusion – I'm not trying to say any bad faith – what I'm drawing from the conclusion is that the State of Florida used the *nolle pros* for the purpose of avoiding the particular jury that was, I believe, had been originally selected in the afternoon." *Id*. at 942. Because the trial court had made a finding of no bad faith, the State argued on appeal that reversal of the court's dismissal was mandated. *Id.* The Court of Appeals disagreed that a finding of bad faith was indispensable to a finding that Goodman's due process rights had been violated. *Id*. The Court concluded that "[i]t is clear to us that the trial court found that the *nol pros* was done solely to avoid the jury just selected, and that the jury just selected included a member whom the state had sought to excuse peremptorily in violation of the rule against invidious racial discrimination in the exercise of peremptory challenges.

We conclude that it is a denial of due process for the state to *nol pros* in order to avoid having a jury so constituted." *Id*. at 92-943.

In *State v Hurd*, 739 So.2d 1226 (Fl.2d DCA. 1999), the trial court denied the State's motion for a continuance after the jury was selected, but before it was sworn. *Id*. The State needed the continuance because its primary witness had failed to appear. *Id*. The trial court denied the motion and the State entered a *nolle prosequi* and then refiled the case. *Id*. After the State refiled charges, Hurd filed a motion to dismiss alleging that the State had entered the *nolle prosequi* solely to avoid the trial court's denial of its motion for continuance. *Id*. The motion to dismiss was granted after an evidentiary hearing.

On appeal, the Court began its analysis with the "recognition that generally it is permissible for the State to refile charges it has nolle prossed, so long as it complies with the applicable statute of limitations and the speedy trial rule. *Id*. at 1228, citing *Boston v. State*, 645 So.2d 553 (Fla. 2d DCA 1994). The validity of Hurd's due process violation depended on whether the State's action was motivated by an improper purpose and whether Hurd suffered any prejudice. *Id*. This due process analysis is based on due process inquiries used by the United States Supreme Court, e.g. *United States v. Lovasco*, 431 U.S. 783, 790, 97 S.Ct. 2044, 52 L.Ed.2d 752 (1977) (due process inquiry based upon pre-indictment delay must consider the reasons for the delay as well as the prejudice to the accused).

The *Hurd* case distinguished *Goodman, supra,* finding no bad faith since the *nolle prosequi* in *Hurd* was caused by the unavailability of an indispensable witness.

In Appellant's case, there is no question that the State's motivation in entering the *nolle prosequi* was to avoid Judge Anderson's ruling excluding the DNA evidence. Under the analysis of the cases discussed above, that is bad faith and if Appellant was prejudiced, a due process violation has occurred.

Appellant was prejudiced because the State's manipulation of the law required him to defend against evidence Judge Anderson had found, after a full and fair hearing, to be unreliable as not being generally accepted within the scientific community (Supp. L.F. 92). The DNA evidence gave the State's case a legitimacy lacking in the testimony of Sarah and Dawn, who could not agree on most of the facts of the case.

Appellant submits that the time has come for Missouri courts to curb the misuse of the prosecutors' discretion to enter a *nolle prosequi* when that discretion is used to circumvent a lawful ruling by the trial court or to prejudice the defendant. This is not an unprecedented request. In *State ex. rel Patterson v. Randall*, 637 S.W.2d 16, 18 (Mo. banc 1982), this Court limited the prosecutor's discretion in seeking a harsher penalty, or charging a greater offense, on retrial after a successful appeal. *Id*. at 19. If the defendant showed a realistic likelihood of prosecutorial vindictiveness, the State must prove "by objective information a justification for the increased sentence or charge." If the State fails to meet that

burden, a presumption of retaliation is justified and a due process violation has occurred. *Id*.

COLLATERAL ESTOPPEL

In the Court below, the State relied on. *Maggard, supra*; *Beezley, supra;* and. *Pippenger, supra* for the proposition that the prosecutor in this case did not act in bad faith since he was doing what these, and other Missouri cases, allow him to do. In each of these three cases the State's power to enter a *nolle prosequi* went unquestioned and the issue on appeal was whether collateral estoppel should be applied to one court's ruling on a motion to suppress evidence after the State enters a *nolle prosequi* and refiles the same charges. 906 S.W.2d at 848; 752 S.W.2d at 917; 741 S.W.2d at 711.

The practical effect in each of these cases was that the State was able to relitigate a motion to suppress after an adverse ruling in the first case. But motions to suppress are interlocutory and therefore there was no judgment on the merits as required for collateral estoppel. 906 S.W.2d at 848; 752 S.W.2d at 917-918; 741 S.W.2d at 711. As the Court in *Pippenger* noted, "a trial court can receive additional evidence and change its ruling prior to admitting the objected-to items in evidence before a jury." 741 S.W.2d at 711, quoting *State v. Howell*, 524 S.W.2d 11, 19 (Mo. banc 1975). That is not the case with evidence excluded on the basis that the evidence is not "sufficiently established to have gained general acceptance in the particular field in which it belongs." *Frye v. U.S*., 293 F. 1013

(D.C. Cir 1923). That is a final judgment since the trial court would hear no more evidence and would have no basis for changing its ruling.

The State's reliance on *Maggard*, *Beezley* and *Pippenger*, brought the issue of collateral estoppel into Appellant's case. Therefore, if this Court determines that the State did not act in bad faith such as to deny him his right to due process of law, U.S. Const. Amend. XIV; Mo. Const. Art. I, Section 10, Appellant requests that this Court find that collateral estoppel bars the State from relitigating Judge Anderson's ruling that the State's DNA evidence was inadmissible under the *Frye* standard.

Application of collateral estoppel requires that: 1) the issue decided in the prior adjudication was identical with the issue presented in the second action; 2) the prior adjudication resulted in a judgment on the merits; 3) the party against whom collateral estoppel is asserted was a party or in privity with a party to the prior adjudication; and 4) the party against whom collateral estoppel is asserted had a full and fair opportunity to litigate the issue in the prior suit. *Pippenger*, 741 S.W.2d at 711 (citations omitted). All of those requirements are met in Appellant's case.

REMEDY

The record in this case leaves no doubt that the prosecutor filed his *nolle prosequi* in Appellant's case in order to defeat the lawful ruling of Judge Anderson. This was an abuse of his discretion and rises to a due process violation. This Court should put a stop to such abuses by holding that before the State can

dismiss a charge without prejudice, it must explain to the trial court, by objective information, its justification for doing so. If the State cannot make that showing, the trial court should have jurisdiction to deny the State's request to file a *nolle prosequi*, and hold that if the State proceeds with the *nolle prosequi*, the dismissal will be with prejudice. Appellant's case should have been dismissed with prejudice, and he requests that this Court hold accordingly.

In the alternative, if this Court does not find bad faith on the part of the State, Appellant requests that his conviction be reversed, and that the State be collaterally estopped from relitigating the *Frye* issue before his new trial.

CONCLUSION

Forum shopping and "peek and run" tactics are just as wasteful of judicial resources, just as adverse to the public interest, and just as improper in criminal cases as they are in civil cases. The federal courts and the courts of almost every other State have recognized that the unfettered discretion of prosecutors to enter a *nolle prosequi*s leads to abuses which the courts have an obligation to remedy. When the State acts in bad faith, against the public interest, and prejudices the defendant, the result is no longer a common law tradition Missouri courts are powerless to curb, but a denial of due process that Missouri courts are obligated to address.

II.

The trial court erred in denying Appellant's motion for judgment of acquittal on Count II, statutory sodomy committed by Appellant placing his penis in the mouth of Dawn Zepeda, in accepting the jury's guilty verdict on that count and in sentencing Appellant on that count because there was insufficient evidence to prove his guilt beyond a reasonable doubt as required by the due process clause of the Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Missouri Constitution, in that Dawn Zepeda's testimony on that issue was so contradictory that it could not be relied on and without corroboration, leaves the mind clouded with doubt concerning Appellant's guilt of that offense.

The trial court erred in overruling Appellant's motion for judgment of acquittal at the close of all of the evidence on Count II (L.F. 6, 60), because the State failed to prove that Appellant placed his penis inside the mouth of Dawn Zepeda.

Preservation:

Appellant filed motions for judgment of acquittal at the close of the State's case (L.F. 58) and at the end of all of the evidence (L.F. 60). Both of those motions were denied (L.F. 6, Tr. 550). Appellant included this issue in his motion for new trial (L.F. 77) and therefore it is properly preserved for review by this Court.

Standard of Review:

In testing the sufficiency of the evidence to support a conviction, the appellate court must accept the State's evidence as true and give the State the benefit of all reasonable inferences, while disregarding all evidence and inferences to the contrary. *State v. LaRette*, 648 S.W.2d 96, 98, (Mo.banc), *cert. denied* 464 U.S. 908 (1983).

The Facts:

The only testimony concerning oral sodomy came from Dawn Zepeda. Her testimony concerning Count II is as follows:

Q. While in the bedroom again, Dawn, did he ever put his penis anywhere else on or in your body?

A. Yeah.

Q. Where?

A. He tried to have me to suck on it.

Q. With what?

A. With my mouth.

Q. And did that happen in the bedroom?

A. Yes.

Q. Did he put his penis in your mouth?

A. For a few minutes, yes.

Q. Did that happen in the bedroom more than once?

A. No.

Q. How many times did it happen?

A. Just one time in there.

Q. One time in the bedroom?

A. Yeah.

(Tr. 388-389);

Q. Dawn, while at the truck, either in front or back of the truck, did he ever do anything else to you with his penis?

A. He had me try to suck on it one time.

Q. And did you do that?

A. I told him I didn't want to, no.

Q. And did it happen at the truck?

A. No.

(Tr. 392);

Q. Now you told the prosecutor that Jerry had you perform oral sex, meaning he put his penis in your mouth. How many times did that happen?

A. Once or twice.

Q. Dawn, do you remember testifying up in Hickory County last summer?

A. No.

Q. Do you remember going to a big courtroom and there was a judge and I was there and Mr. Hendrickson was there?

A. Oh, yeah.

Q. Do you remember Mr. Hendrickson put you on the witness stand?

A. Yes.

Q. You remember that? And he asked you some questions. And I'm going to read you a couple of his questions to see if you recall these questions. Do you remember when Mr. Hendrickson, --

Mr. Hendrickson: Can I get a reference please?

Mr. Perry: Page four.

Q. (Cont. by Mr. Hendrickson (sic)) Do you remember when Mr. Hendrickson asked you this question: "Did he ever ask you to suck his penis?" Do you remember that question?

A. Yes.

Q. Do you remember what your response was?

A. No, I don't.

Q. "He did it once or twice. I didn't do it." Do you remember that?

A. No.

Q. Do you remember the next question, "You didn't do it? Did you ever put your mouth on his penis?" Do you remember that question?

A. No.

Q. Your answer was, "No." Do you remember that?

A. No.

Q. Next question, "Did he ask you to do that?" Do you remember that question?

A. Yes.

Q. What did you say to that?

A. Yes.

Q. Yeah or yes?

A. Yes, he did.

Q. The next question was, “Did he ever touch his penis to your mouth?” Do you remember that question?

A. Yes.

Q. Your answer was apparently inaudible so Mr. Hendrickson said, “I’m sorry?” Do you remember that?

A. Yes.

Q. And your answer was, “No.” Did you try to tell the truth last summer when you were testifying?

A. Yes.

(Tr. 401-403);

Q. Dawn, during those pre – during those previous times, have you testified that the defendant put his mouth in your penis (sic)?

A. Yes.

Q. Do he (sic) do that?

A. Yes.

Q. I didn’t hear you.

A. Yes.

(Tr. 421).

Argument:

Count II of the Amended Information charged in relevant part that Appellant committed the Class C felony of statutory sodomy in the second degree, in violation of Section 566.064 in that:

> On, about, or between February 1999, through and until August, 1999 in the County of Hickory, State of Missouri, that Defendant had deviate sexual intercourse with Dawn Zepeda, DOB 01-11-83, and at the time Dawn Zepeda was less than 17 years old and the Defendant, DOB: 04-02-57, was 21 years of age or older.

(L.F. 8-9). The verdict director for Count II, specified that the act Appellant allegedly committed was that "the defendant put his penis in the mouth of Dawn Zepeda" (L.F. 69).

Due process demands that the State prove each essential element of an offense beyond a reasonable doubt before it may deprive a citizen of his liberty. *In re Winship*, 397 U.S. 307, 315, 99 S.Ct. 2781, 2787, 61 L.Ed2d 560 (1979). This impresses "upon the fact finder the need to reach a subjective state of near certitude of [ ] guilt" and thereby symbolizes the significance that our society attaches to liberty. *Jackson v. Virginia*, 443 U.S. 307, 315, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). The critical inquiry is whether the evidence could reasonably support a finding of guilty beyond a reasonable doubt. *Id*., 443 U.S. at 318.

Normally, the victim's uncorroborated testimony is sufficient to support the submission of a charge of rape or sodomy. *State v. Smith*, 679 S.W.2d 899, 902-03 (Mo.App., S.D. 1984), citing *State v. Rogers*, 583 S.W.2d 293, 295 (Mo.App., W.D. 1979). "It is only in those cases where the evidence of the prosecutrix is of a contradictory nature or, when applied to the admitted facts in the case, her testimony is not convincing and leaves the Court clouded with doubts that she must be corroborated or judgment cannot be sustained." *State v. Kuzma*, 751 S.W.2d 54, 58 (Mo.App., W.D. 1987), citing *State v. Ellis*, 710 S.W.2d 378, 380 (Mo.App. S.D. 1986) (en banc), quoting *State v. Baldwin*, 571 S.W.2d 236, 239 (Mo.banc 1978). Corroboration is required not because the testimony of the victim cannot stand alone, but because the law does not allow an inference of fact from evidence not substantial or probative of that fact. *Kuzma*, 751 S.W.2d at 58, citing *Smith*, 679 S.W.2d at 902.

In *Kuzma*, the State argued that because the inconsistencies in the victim's testimony occurred in out-of-court statements and that her in-court testimony was consistent, the corroboration rule did not apply. 751 S.W.2d at 58. The Court of Appeals rejected that argument, holding that the corroboration rule applied to inconsistent statements made by the victim "at trial, at a deposition, out of court to a third party, and various combinations of those sources. *Id*. (citations omitted).

Inconsistencies concerning facts not essential to the case do not require corroboration. *State v. Salkil*, 659 S.W.2d 330, 333 (Mo.App., W.D. 1983).

However, inconsistencies "going to the heart of the offenses" do trigger the need for corroboration. *State v. Bursley*, 548 S.W.2d 586 (Mo.App., W.D 1976).

In *Bursley*, the facts are much like the facts in Appellant's case. In that case, one of the two alleged victims testified in court that the defendant had sodomized him. But in a deposition, that same victim denied that the defendant had sodomized him and he could not explain the discrepancy. *Id*. at 588. In addition, there was evidence of a motive for the boys to fabricate since defendant had not paid them for work. *Id.*

In *Kuzma*, supra the inconsistencies concerned the identity of the perpetrator. In court, the six year old victim had been found competent to testify. *Id*. at 55. She testified that defendant had spanked her for disobeying, and then had her take her clothes off and stuck his finger in her bottom and in her "potty" place in the front of her body. He then threatened to spank her if she told. On cross examination, the victim admitted that she had once told her mother and grandmother than it was her natural father who had molested her. In a deposition taken ten days before trial, the victim admitted that she had forgotten what places defendant had touched her but in court she remembered. *Id*. at 55-56. She also testified on cross examination that the defendant had molested her twice, once when the family was living in Bonner Springs, Kansas. This contradicted her direct testimony that the molestation had occurred only once, when the family was living in Missouri. *Id*.

In reversing Kuzma's conviction, the Court indicated that the inconsistencies of the victim's testimony went directly to the identity of the perpetrator. *Id*. at 59. Although the victim had no motive for fabricating her testimony, her mother admitted that she had telephoned the defendant and threatened to make things worse for him and that she would not have instigated the prosecution if he had not moved out. *Id.*

In *State v. Pierce*, 906 S.W.2d 729 (Mo.App., W.D. 1995), the victim had made out-of-court statements to DFS and to the police that she had sexual intercourse with Pierce. At trial, as well as in a deposition, the victim recanted her allegations and said that she had never had sexual intercourse with the defendant. *Id*. at 732. In reversing, the Court of Appeals noted that "her subsequent statements and in-court sworn testimony, unequivocally contradict her earlier statements and deny the essential element of the crime. Sufficient corroboration of the out-of-court statements was, in this case, required but the corroborative evidence was not sufficient to support the verdict." *Id.* at 735.

In Appellant's case, Dawn testified in court that Appellant had placed his penis in her mouth for a "few minutes" in an attempt to make her suck it (Tr. 389). In previous testimony in Hickory County, she testified that Appellant never placed his penis in her mouth, and that she was telling the truth when she testified to that fact (Tr. 402-403). And on redirect, she testified that she had made previous out-of-court statements that Appellant had placed his penis in her mouth, and that was the truth (Tr. 421). Of note, in the State's attempt at rehabilitation, the prosecutor

misspoke and asked Dawn if "the defendant put his mouth in your penis (sic)?" (Tr. 421). Dawn responded "Yes," without any attempt to clarify the question. Dawn's contradictions went directly to the essential element of the offense, did Appellant place his penis in her mouth? Therefore, there is a need for corroboration. There is no corroboration for this allegation. The DNA evidence presented by the State certainly corroborates Dawn's testimony about sexual intercourse, and Dawn's testimony concerning anal intercourse was apparently consistent throughout the prosecution since the defense failed to elicit any contradictory out-of-court statements concerning that allegation.

In addition, like the *Bursley* and *Kuzma* cases, there is evidence in this case that there was a motive for Dawn to fabricate. At trial, Dawn, testified that her mother had asked her twice before the move to North Carolina if Appellant was molesting her (Tr. 398). In a deposition, Dawn had testified that her mother asked her "like a hundred times", "it was a lot, about every day." (Tr. 400). Sarah testified that when Appellant ceased having intercourse with her (Tr.282), and began going out at night without telling her where he was going she became suspicious that he was either having an affair or abusing Dawn (Tr. 272, 311). She asked Dawn if Appellant had ever touched her and she said "no." (Tr. 273). Sarah testified that she quizzed Dawn three or four times and Dawn always said "no." (Tr. 297). Dawn assured Sarah that she would tell her if anyone, concluding Appellant, ever touched her (Tr. 299).

Two days after Easter, 1999, Appellant gave Sarah a diamond ring (Tr. 270). When Appellant told her to pack up because they were going to North Carolina, Sarah assumed Appellant was going with them (Tr. 284). It was not until they arrived in North Carolina that Sarah realized that Appellant did not intend to stay (Tr. 284). This upset Sarah because she loved Appellant (Tr. 295), and thought they would marry (Tr. 291). Sarah was upset, hurt and angry (Tr. 295-296). She cried and begged Appellant to stay (Tr. 311). It was two days after being left in North Carolina that Dawn made her allegations against Appellant (Tr. 312).

Given the fact that Dawn's testimony is inconsistent on an essential element of oral sodomy and that there appears to be a motive for her to fabricate, this Court should find that corroboration is necessary to support a finding of guilt beyond a reasonable doubt. Dawn's testimony did not provide the jury with proof beyond a reasonable doubt that Appellant placed his penis in her mouth. Therefore, this Court should vacate Appellant's conviction on Count II and discharge him from his sentence on that charge.

III.

The trial court abused its discretion in granting the State's Motion for Pretrial Ruling on the General Acceptance and Admissibility of PCR-STR DNA Testing Technology and Brief in Support Thereof and denying Appellant's Motion to Determine Admissibility of Novel Scientific Evidence and Request for a *Frye* Hearing and in admitting the State's DNA evidence without first holding an evidentiary hearing pursuant to *Frye* because those rulings denied Appellant's right to due process and a fair trial as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, Sections 10 and 18(a) of the Missouri Constitution in that the Appellant was denied the opportunity to prove that the new DNA technology, STR is not generally accepted in the scientific community because the primer sequences of the test kits used, Profiler Plus and COfiler, have not been released to the scientific community for peer review and verification of the validity of the method to produce reliable results.

The trial court abused its discretion when it refused to allow Appellant the opportunity to show that the PCR-STR kits used by the Missouri State Highway Patrol are not generally accepted in the scientific community. As was shown in Point I above, had Appellant been given the opportunity to prove its allegations, there is a probability that the trial court would have found the primer kits used by the laboratory in this case have never been independently validated and therefore the accuracy of the results from tests using those kits are suspect.

Preservation:

Prior to trial, Appellant filed his Motion to Determine Admissibility of Novel Scientific Evidence and Request for a *Frye* Hearing (Supp. L.F. 83). The motion was overruled without a hearing (L.F. 40). When the State asked Cary Maloney if the PCR-STR method of DNA testing was generally accepted within the scientific community, Appellant renewed his objection to the trial court's ruling allowing this evidence to be introduced without a hearing (Tr. 449). Appellant included this claim of error in his motion for new trial (L.F. 79), and therefore the issue is properly preserved for review by this Court.

Standard of Review:

The standard of review is for an abuse of discretion. *State v. Salmon*, 89 S.W.3d 540 (Mo.App., W.D. 2002).

The Facts:

Cary Maloney, a criminalist supervisor at the MSHP laboratory testified for the State. Maloney conducted the tests in Appellant's case beginning on August 23, 2000 (Tr. 518). The MSHP laboratory began using the PCR-STR method of DNA testing in 1999 (Tr. 509). There was no testimony as to when the laboratory began using the Perkin-Elmer (now Applied Biosystems) test kits, ProfilerPlus and COfiler (Tr. 447, 450, 456).

Maloney testified that the STR technique is generally accepted within the forensic scientific community (Tr. 450). In testifying about the importance of primers, Maloney testified that:

> The marker, the particular marker or the area of that total DNA that we're interested in is determined by the primers that we use in order to amplify the DNA for eventual typing. Those primers will set down in a specific area and only that area each time and will amplify or copy only the regions that we're most interested in.

(Tr. 456).

In discussing the sensitivity of the STR method, Maloney admitted that there are concerns about contamination (Tr. 517). In fact, in Appellant's case, the first run that Maloney performed was contaminated with his own DNA. That was the first time that had happened in his seventeen years with the laboratory (Tr. 517, 522).

Dean Stetler testified for the defense (Tr. 551). Stetler is a Associate Professor of Molecular Bio-sciences at the University of Kansas (Tr. 551). He was the chair of the genetics department from 1987 until 1995 (Tr. 551). He operates a research laboratory at the university (Tr. 552).

Stetler testified that the ProfilerPlus and COfiler kits were first put on the market in 1998 (Tr. 555). The kits include primer sets, a primer set for each locus or location of the genome that's being analyzed, various reagents, and an enzyme for amplification (Tr. 557). When asked if, as a scientist, he had any concerns about these two kits, Stetler testified that "not all the components have been fully defined and subject to peer review and independent testing. The primer sets which

are one of the most important components of the kit has (sic) never been – the sequences of those primers have never been published." (Tr. 559).

The only validation studies of the ProfilerPlus and COfiler kits of STR capillary electrophoresis validation studies were performed over a period starting about 1996-1997 and were published in 2003 (Tr. 562). The authors of those studies were both employees of Applied Biosystems (Tr. 562). A complete independent testing cannot be done without knowledge of the sequence of the primers (Tr. 563). Stetler obtained the Applied Biosystem's primer sequence when a Kansas court ordered that it be disclosed to him (Tr. 564). However, he first had to sign a document stating that he was not allowed to do any research with those primer sequences, so having the sequences themselves was of very little use (Tr. 564).

On cross examination, Stetler testified that there have been a few instances in the literature of comparisons between the Applied Biosystems' kits and the Promega kits (Tr. 611). One study showed that at the VWA locus the two kits were supposed to be amplifying the same locus but they did not give the same results. Since the scientific community knows Promega's primer sequences, their primer sets can be synthesized and tested to determine if there was a problem, but the same cannot be done with the Applied Biosystems' kits (Tr. 611).

Stetler agreed with Maloney that the STR method is so sensitive that it is very easy to contaminate a sample (Tr. 566). In Appellant's case, Stetler accounted for the aberrant peaks seen in the first run of Appellant's known sample

as some sort of contamination (Tr. 585). Finally, Stetler testified that the fact that Maloney ran four tests and received four different results indicated that there was a problem. (Tr. 601).

Argument:

Missouri follows the standard set forth in *Frye v. U.S.*, 293 F. 1013 (D.C. Cir. 1923), to determine the admissibility of scientific evidence. "The long accepted standard for admissibility of results of scientific procedures enunciated in *Frye v. United States* requires that such may be admitted only if the procedure is 'sufficiently established to have gained general acceptance in the particular field in which it belongs.'" *State v. Davis*, 814 S.W.2d 593, 600 (Mo. banc 1991), *quoting Frye*, 293 F. at 1014. Whether or not a procedure has gained acceptance in the relevant field and is admissible scientific evidence is established in a *Frye* hearing – that is a hearing held outside of the presence of the jury. *State v. Salmon*, 89 S.W.3d 540, 543 (Mo.App., W.D. 2002). In *Salmon*, the Western District of this Court held that even though the trial court failed to hold a *Frye* hearing before admitting the STR evidence in that case, the defendant "would not be prejudiced by the court's failure to hold a *Frye* hearing, unless the evidence was improperly admitted because there was insufficient evidence to prove that the PCR-STR method of DNA testing has gained general acceptance in the scientific community." *Id*. at 544. The Court then made its own determination that the evidence presented at trial was sufficient to show that the PCR STR method of

DNA testing had gained general acceptance in the scientific community. *Id*. at 544-545.

Appellant submits there are two problems with the Court's decision in *Salmon.* First, the defendant was never given the opportunity to present evidence to show that the STR method was not generally accepted in the relevant scientific community and second, it is not the appellate court's function to make evidentiary determinations. The appellate court normally defers to a trial court's factual findings and credibility determinations and reviews only to determine if those findings are clearly erroneous. Only questions of law are reviewed *de novo. State v. Schmutz,* 100 S.W.3d 876, 878 (Mo.App., S.D. 2003); *State v. Faulkner*, 103 S.W.3d 346, 355 (Mo.App., S.D. 2003); *State v. Willis*, 97 S.W.3d 548, 553 (Mo.App., W.D. 2003).

However, *Salmon* case differs from Appellant's case in another important way. There is no mention in *Salmon* about the ProfilerPlus and COfiler kits used by the MSHP laboratory. That was the primary issue in Appellant's case and the use of those untested and unvalidated test kits was what made the testing in Appellant's case unacceptable to the scientific community.

In a recent decision, *State v. Faulkner, supra*, there had been an evidentiary hearing and the trial court had found the STR method of DNA testing admissible. 103 S.W.3d at 356. On appeal, Faulkner had complained that because the primers used in the ProfilerPlus and COfiler kits were unpublished, no independent validation studies could be performed. *Id*. at 358. In responding to that issue, the

Court held that "the test kits at issue did not involve new scientific techniques. The concerns relating to the reliability of the results produced by the test kits did not implicate the reliability or general scientific acceptance of the principles on which the STR test itself is based." *Id*. at 359. However, as Dr. Stetler testified at Appellant's trial, without knowing the primer sequence, there is no way of knowing the accuracy of the testing (Tr. 562). Unlike the evidence presented in *Faulkner*, in Appellant's case both Maloney and Stetler testified that the primer sequence does implicate the reliability of the principles on which the STR test itself is based. (Tr. 456, 559).

Appellant was entitled to a hearing to prove his allegations that the use of the ProfilerPlus and COfiler kits are not generally accepted in the scientific community because they have not been subject to any independent validation studies.

In finding that the RFLP process of DNA testing employed by Cellmark passed the *Frye* test in, this Court made repeated references to the reliability of the process used. *Davis, supra*, 814 S.W.2d at 600-603. In addition, this Court recognized "that certain scientific processes are inadmissible because the process is too new to obtain current acceptance within the scientific world but with the passage of time such process may gain general acceptance. *Id*. at 600, *citing State v. Stout*, 478 S.W.2d 368, 372 (Mo. 1972).

Such is the case here. Appellant was prejudiced by the trial court's ruling and refusal to allow him to present his evidence because there is a probability that

if given that chance, Appellant could have convinced the trial court that the use of the Applied Biosystems kits is not generally accepted within the relevant scientific community and that they are implicated in the reliability of test results. This unreliability was evidenced by Maloney's testimony that with the STR method, there are concerns about contamination (Tr. 517). The test he ran in this case is an excellent example of the basis for that concern; for the first time in his seventeen years experience, Maloney had a test contaminated with his own DNA (Tr. 517, 522).

In *Davis*, *supra*, this Court noted that "the manner in which the tests were conducted goes more to the credibility of the witness and the weight of the evidence, which is in the first instance a discretionary call for the trial court. . ." *Id.* at 603. Senior Judge Anderson heard the evidence and in the exercise of his discretion, found the DNA testing process utilized in this case to be inadmissible.

Unlike the Court in *Salmons*, this Court should not try and make a determination of whether Appellant would have succeeded in excluding the DNA evidence based on what was introduced at trial. Both parties would, for tactical reasons, try and be less technical in front of a jury than they would be in presenting evidence to the court. Appellant never got his opportunity to prove that the DNA evidence in this case was inadmissible under *Frye*. That was an abuse of the trial court's discretion, and this Court should reverse Appellant's conviction and remand for a new trial, giving him an opportunity to present evidence to the trial court that the State's PCR-STR evidence is inadmissible.

CONCLUSION

For the reasons stated in Point and Argument I, this Court should reverse Appellant's convictions and discharge him from custody, or, in the alternative, remand his case for a new trial without the DNA evidence which Senior Judge Anderson ruled inadmissible. For the reasons stated in Point and Argument II, this Court should reverse Appellant's conviction on Count II and discharge him from his sentence on that count. For the reasons stated in Point and Argument III, this Court should reverse Appellant's convictions and remand his case for a new trial.

Respectfully submitted,

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Certificate of Compliance and Service

I, Nancy A. McKerrow, hereby certify to the following. The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, Office 2002, in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 14,106 words, which does not exceed the 31,000 words allowed for an appellant's brief.

The floppy disk filed with this brief contains a complete copy of this brief. It has been scanned for viruses using a McAfee VirusScan Enterprise 7.1.0, updated in June, 2004. According to that program, the disks provided to this Court and to the Attorney General are virus-free.

Two true and correct copies of the attached brief and a floppy disk containing a copy of this brief were mailed, postage prepaid this 14th day of June, 2004, to Richard Starnes, Assistant Attorney General, P.O. Box 899, Jefferson City, Missouri 65102-0899.

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Nancy A. McKerrow

APPENDIX

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